United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-2235

JOSE PADILLA, DONNA R. NEWMAN,
as Next Friend of Jose Padilla,

Petitioner-Appellee-Cross-Appellant,

-v.-

DONALD RUMSFELD,

Respondent-Appellant.

BRIEF OF RESPONDENT-APPELLANT

Preliminary Statement

Jose Padilla, by his next friend Donna R. Newman, filed a petition for writ of habeas corpus in the United States District Court for the Southern District of New York, invoking that court's jurisdiction under 28 U.S.C. 2241. On December 4, 2002, the district court (Mukasey, C.J.) entered an opinion and order, reported at 233 F. Supp. 2d 564, denying respondent's motions to dismiss. On March 11, 2003, the district court entered an opinion and order, reported at 243 F. Supp. 2d 42, granting respondent's motion for reconsideration but adhering to the court's initial order. On April 9, 2003, the district court entered an opinion and order, reported at 256 F. Supp. 2d

218, certifying its previous orders for interlocutory appeal pursuant to 28 U.S.C. 1292(b). On June 10, 2003, this Court entered an order granting the parties' motions for interlocutory appeal. This Court has jurisdiction pursuant to 28 U.S.C. 1292(b).

Questions Presented

1. Whether the district court has jurisdiction over the proper respondent to the habeas petition.

2. Whether Padilla's attorney has standing to bring a habeas petition on his behalf as his next friend.

3. Whether the district court erred in ordering the military to permit Padilla, who is being detained as an enemy combatant during wartime, to meet with counsel for the purpose of challenging the factual basis for the President's determination that Padilla is an enemy combatant.

Statement

1. On September 11, 2001, the al Qaida terrorist network launched a large-scale, coordinated attack on the United States, specifically targeting the Nation's financial center and the headquarters of its Department of Defense. The September 11 attacks killed more than 3,000 persons, exceeding the loss of life inflicted by the attack on Pearl Harbor.

The President, pursuant to his authority as Commander in Chief, took immediate steps to prevent future attacks. Congress acted to support the President's use of force against the "nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."

Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Congress emphasized that those forces "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Ibid*.

The President ordered the armed forces of the United States to Afghanistan to subdue al Qaida and the Taliban regime that supported it. The United States' military operations, which are ongoing, have resulted in the destruction of many al Qaida training camps and have yielded vital intelligence concerning the capabilities and intentions of al Qaida and its supporters. The al Qaida network remains a serious threat to the national security during the continuing military campaign, as is demonstrated by recent al Qaida bombing attacks in Bali, Casablanca, and Saudi Arabia.

Of particular significance, there is a risk of future terrorist attacks on United States citizens and interests carried out—as were the attacks of September 11—by enemy combatants who infiltrate the United States. The capture and detention of enemy combatants is critical to preventing additional attacks on the United States, aiding the ongoing military operations, and obtaining vital intelligence in advancement of the war effort. Petitioner Padilla is being held by the military as an enemy combatant in the course of the continuing armed conflict.

2. On May 8, 2002, the district court issued a material witness warrant for Padilla's arrest in connection with grand jury proceedings in the Southern District of New

York. Padilla was arrested that day upon arriving in Chicago from Pakistan. On May 15, 2002, following Padilla's removal to New York City, the district court ordered that Padilla be detained and appointed Donna R. Newman, Esq., as Padilla's counsel.

On June 9, 2002, the President determined that Padilla is an enemy combatant and directed his transfer to the control of the United States military. President's Order (June 9, 2002), JA 51. The President's determination, as is explained in the Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy (Aug. 27, 2002) (Mobbs Declaration), JA 44-49, was based on information that Padilla is closely associated with al Qaida and came to the United States to advance plans to detonate explosive devices, including a "radiological dispersal device" (or "dirty bomb"), within the United States' borders.[*]

As the Mobbs Declaration explains, the information weighed by the President evidenced that Padilla moved to Egypt in 1998 after his release from prison in the United States and subsequently became known as Abdullah Al Muhajir. JA 45-46 (¶ 4). Over the next three years, Padilla traveled to Pakistan, Saudi Arabia, and Afghanistan.

---

[*] A classified version of the Mobbs Declaration providing additional detail concerning the determination that Padilla is an enemy combatant was submitted under seal and *ex parte* in the district court. That classified version is in the possession of the Court Security Officer of the district court and is available for this Court's review upon request.

JA 45-46 (¶¶ 4, 6). During his time in the Middle East, Padilla was closely associated with the al Qaida network and its leaders. JA 46 (¶ 5). While in Afghanistan and Pakistan in 2001 and 2002, Padilla met several times with al Qaida officials and senior al Qaida operatives. JA 46, 47 (¶¶ 6, 9-10). In those meetings, Padilla proposed to conduct terrorist operations within the United States and discussed his involvement in operations targeting the United States—including a plan to detonate a dirty bomb, as well as other operations involving the detonation of explosive devices in hotel rooms and gas stations. JA 46-47 (¶¶ 8-9). Padilla received training from al Qaida operatives, including on the wiring of explosive devices. JA 46, 47 (¶¶ 6, 10). Padilla was directed by al Qaida members to return to the United States to explore and advance plans for further attacks against the United States. JA 47 (¶ 9). Multiple intelligence sources confirmed Padilla's involvement in planning terrorist attacks by al Qaida against United States citizens and interests. JA 45 (¶ 3).

The President, after weighing that information, concluded that Padilla "is, and at the time he entered the United States in May 2002 was, an enemy combatant." President's Order (June 9, 2002), JA 51. The President determined, in particular: that Padilla is "closely associated with al Qaeda"; that he has "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States"; that he "possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to

prevent attacks by al Qaeda"; that he "represents a continuing, present and grave danger to the national security of the United States"; and that his detention as an enemy combatant "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." *Ibid*. Accordingly, the President directed the Department of Defense "to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant." *Ibid*.

Upon issuance of the President's determination on June 9, 2002, the Department of Justice immediately requested the district court to vacate the material witness warrant. The district court vacated the warrant that day, and Padilla was transferred to military control and transported to the Naval Consolidated Brig, Charleston, South Carolina, for detention as an enemy combatant.

3. a. On June 11, 2002, Padilla's attorney Donna R. Newman, filed a habeas petition in the district court challenging the legality of his detention. JA 21-25.* On June 19, 2002, Ms. Newman, styling herself as Padilla's next friend, filed an amended habeas petition on Padilla's behalf. JA 26-35. The amended petition names as respondents the President, the Secretary of Defense, the Attorney General, and Commander Melanie A. Marr, commanding officer of the Naval Consolidated Brig, Charleston, where

---

* Although Ms. Newman's initial appointment as Padilla's counsel terminated when the material witness warrant was vacated, the district court re-appointed her as Padilla's attorney for the habeas proceeding. See 233 F. Supp. 2d at 600.

Padilla is being held. JA 28 (¶¶ 8-11). The amended petition alleges that Padilla's detention violates the Fourth, Fifth, and Sixth Amendments to the Constitution, as well as the Posse Comitatus Act, 18 U.S.C. 1385. JA 32-33 (¶¶ 33-35, 38-40). As relief, the amended petition seeks, *inter alia*, an order permitting Padilla to meet with counsel, an order barring interrogation of Padilla during his detention, and an order releasing Padilla from military confinement. JA 34.

On June 26, 2002, the government filed a motion to dismiss the amended petition on two independent jurisdictional grounds: (i) that attorney Newman lacks standing as a next friend to file the petition on Padilla's behalf; and (ii) that the district court lacks territorial jurisdiction over the only proper respondent to the petition—Commander Marr, Padilla's immediate custodian at the Naval Consolidated Brig, Charleston—such that the petition should have been filed in the District of South Carolina.

On August 27, 2002, in response to the district court's direction to address the merits, the government filed a response to and motion to dismiss the amended petition on the merits. The government argued that the military's authority to detain enemy combatants in wartime is well-settled and applies in the circumstances of this case. The government further contended that judicial review of the Commander in Chief's wartime judgments would raise serious separation-of-powers concerns, and that review of the factual basis for the President's determination that Padilla is an enemy combatant could extend no further than assessing whether there is "some evidence" supporting that determination. To that end, the government

submitted the Mobbs Declaration setting forth the evidentiary basis for the President's determination.

b. On December 4, 2002, the district court issued an opinion and order resolving the jurisdictional issues and several of the issues on the merits. *Padilla* v. *Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002). On the jurisdictional issues, the court first ruled that attorney Newman had a sufficient relationship with Padilla to qualify as his next friend for standing purposes. *Id.* at 575-578. On the question whether the court had jurisdiction over the proper respondent to the amended petition, the district court acknowledged that, "in the usual habeas corpus case * * * courts have held consistently that the proper respondent is the warden of the prison where the prisoner is held." *Id.* at 578. The court nevertheless held that, in this case, Secretary Rumsfeld rather than Commander Marr was the proper respondent. *Id.* at 582. The court further found that the reach of a habeas court's jurisdiction is defined by the forum state's long-arm statute, and that, under the New York statute, Secretary Rumsfeld is subject to the court's jurisdiction. *Id.* at 584-586.

On the merits, the district court agreed with the government that the Commander in Chief has wartime authority to detain enemy combatants, including, as here, in the case of a United States citizen captured on United States soil. *Id.* at 587-596. The court further held that the President's Commander-in-Chief authority is not confined to circumstances involving a formal declaration of war or a conventional conflict between nation states. *Id.* at 588-590. The court also agreed with the government that the proper standard of judicial review of the President's determina-

tion that Padilla is an enemy combatant entails a deferential assessment whether there is "some evidence" supporting that determination. *Id.* at 605-608.

Although agreeing with the government on the appropriate standard of review, the court rejected the government's argument that the Mobbs Declaration suffices to demonstrate the existence of "some evidence" supporting the President's determination that Padilla is an enemy combatant. The court instead ruled that Padilla should be afforded access to counsel for the purpose of presenting facts in support of the petition. *Id.* at 599-605. The court did not find a right to counsel under the Constitution: It ruled that neither the Sixth Amendment nor the Fifth Amendment's Self-Incrimination Clause affords Padilla a right to counsel, and it declined to rely on the Fifth Amendment's Due Process Clause. See *id.* at 600-601. Instead, the court granted access to counsel as a matter of discretion under the All Writs Act, 28 U.S.C. 1651(a), reasoning that the habeas statutes contemplate an opportunity for a detainee to present facts in support of the petition. 233 F. Supp. 2d at 601-603. The court rejected the government's submission that affording Padilla access to counsel would entail an undue risk of undermining his interrogation by the military and compromising national security. *Id.* at 603-605.

c. On January 9, 2003, the government moved for reconsideration of that part of the district court's order directing that Padilla be permitted to meet with counsel. The government submitted the Declaration of Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency (Jan. 9, 2003) (Jacoby Declaration),

JA 55-63, which describes the significant national security concerns raised by interposing counsel into the military's efforts to obtain vital intelligence from Padilla.* The government also argued that, because the "some evidence" standard accepted by the district court turns exclusively on the evidence relied on by the *Executive* in determining that Padilla is an enemy combatant, there is no need to require that Padilla be afforded access to counsel to enable him to present facts related to the petition. On March 11, 2003, the district court entered an opinion and order granting the government's motion for reconsideration but adhering to its previous order requiring that Padilla be afforded access to counsel. *Padilla* v. *Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003).

d. On March 31, 2003, the government moved the district court to certify its December 4, 2002, and March 11, 2003, orders for interlocutory appeal pursuant to 28 U.S.C. 1292(b). On April 9, 2003, the district court granted the government's motion, ruling that certification was appropriate based on the following questions addressed by those orders:

---

* A classified version of the Jacoby Declaration containing additional information supporting the points raised in the unclassified version was submitted under seal and *ex parte* in the district court. That classified version is in the possession of the Court Security Officer of the district court and is available for this Court's review upon request.

1. Is the Secretary of Defense, Donald Rumsfeld, a proper respondent in this case.

2. Does this court have personal jurisdiction over Secretary Rumsfeld?

3. Does the President have authority to designate as an enemy combatant an American citizen captured within the United States, and, through the Secretary of Defense, to detain him for the duration of the armed conflict with al Qaeda?

4. What burden must the government meet to detain petitioner as an enemy combatant?

5. Does petitioner have the right to present facts in support of his habeas corpus petition?

6. Was it a proper exercise of this court's discretion and its authority under the All Writs Act to direct that petitioner be afforded access to counsel for the purpose of presenting facts in support of his petition?

Padilla v. *Rumsfeld*, 256 F. Supp. 2d 218, 223 (S.D.N.Y. 2003). While granting certification based on those questions, the court recognized that this Court may address any issue raised by the certified orders. *Id.* at 223 n.3.

On June 10, 2003, this Court granted the parties' application for an interlocutory appeal of the district

court's orders. JA 203. The Court's briefing order contemplates that each party would submit opening briefs addressing the issues on which the party did not prevail in the district court. JA 203-204. Accordingly, the government addresses in this brief the questions whether the district court erred in concluding that it has jurisdiction in this case and erred in requiring that Padilla be afforded access to counsel as a means of presenting facts in support of the petition.

SUMMARY OF ARGUMENT

I. Jurisdiction over a habeas action lies only in the district court with territorial jurisdiction over the detainee's immediate custodian. The district court erroneously found that Secretary Rumsfeld is the relevant custodian, and then erroneously asserted jurisdiction even though Secretary Rumsfeld is outside the court's territorial boundaries.

A. The proper respondent under the habeas laws is the detainee's immediate custodian, *i.e.*, the warden or commander of the facility where the prisoner is detained. The district court nonetheless ruled that the proper respondent in this proceeding is Secretary Rumsfeld rather than the immediate custodian, Commander Marr. The court based that conclusion on the Secretary's perceived role in the transfer of Padilla to military control and the ultimate determination of when he will be released. That approach contradicts the settled rule that the proper respondent is the individual with day-to-day physical control over the detainee, not an individual with ultimate decision-making authority. *E.g.*, *Billiteri* v. *United States Bd. of Parole*, 541 F.2d 938, 948 (2d Cir. 1976). There is no obstacle to

seeking relief in the court with jurisdiction over Padilla's immediate custodian, and therefore no basis for deviating from the settled jurisdictional rule.

B. The habeas statutes confine district courts to issuing the writ "within their respective jurisdictions," 28 U.S.C. 2241(a), a limitation intended to prevent habeas courts from reaching beyond their territorial borders. The district court nonetheless ruled that it could assert jurisdiction over Secretary Rumsfeld, holding that a habeas court has jurisdiction over any respondent subject to process under the forum state's long-arm statute. That conclusion cannot be squared with the statutory direction that there is only *one* district court with territorial jurisdiction in any habeas action. 28 U.S.C. 2241(b). Nor can it be squared with the Supreme Court's holding that a federal statute allowing nationwide service of process against federal officers fails to relax the territorial constraints on habeas courts. *Schlanger* v. *Seamans*, 401 U.S. 487, 490 n.4 (1971).

II. Attorney Newman, who filed the amended petition on Padilla's behalf, lacks "next friend" standing to bring the action. To establish standing to bring a habeas petition on behalf of an inaccessible detainee, a next friend must demonstrate a "significant relationship" with the detainee. *Whitmore* v. *Arkansas*, 495 U.S. 149, 164 (1990). Accordingly, next-friend standing typically is reserved for those with a close, personal relationship with the detainee (such as Padilla's mother). Attorney Newman's legal representation of Padilla for a 25-day period in the material witness proceedings does not establish the requisite significant relationship.

III. The district court erred in ordering that Padilla be afforded access to counsel for the purpose of mounting a factual challenge to the President's determination that he is an enemy combatant. The laws and customs of war recognize no right of enemy combatants to have access to counsel to challenge their wartime detention. In addition, because Padilla is being detained under the laws of war rather than under the domestic criminal laws, the Constitution affords him no right to counsel.

Nor is there any basis for granting access to counsel as a matter of judicial discretion under the appropriate standard of review. Because the President's determination that Padilla is an enemy combatant represents a core exercise of the Commander-in-Chief authority, that determination is entitled to great deference. At most, the President's determination can be reviewed to ensure the existence of "some evidence" supporting it. Because that standard focuses exclusively on the factual support presented by the Executive, there is no warrant for granting Padilla access to counsel to make a factual showing.

Finally, effective interrogation of captured enemy combatants requires achieving an atmosphere of trust and dependency between the subject and his interrogators. Interposing counsel into the relationship would thwart development of the requisite trust and dependency, compromising the military's ability to obtain vital intelligence from Padilla.

ARGUMENT

POINT I

The District Court Lacks Jurisdiction Over The Proper Respondent To The Amended Habeas Petition

Jurisdiction in a habeas proceeding lies only in the district court with territorial jurisdiction over the detainee's immediate custodian. Padilla's immediate custodian is Commander Marr, commanding officer of the Naval Consolidated Brig, Charleston. Accordingly, jurisdiction over the amended petition lies in the District of South Carolina, not the Southern District of New York.

In concluding otherwise, the district court determined that: (i) the proper respondent to the amended petition is Secretary Rumsfeld rather than Commander Marr; and (ii) a district court's habeas jurisdiction extends beyond its territorial boundaries to reach any respondent subject to service under the forum state's long-arm statute. Both of those conclusions are necessary to sustain the district court's jurisdiction. Neither is correct.

A. The Proper Respondent To The Amended Petition Is Padilla's Immediate Custodian, Commander Marr, Not Secretary Rumsfeld

1. The proper respondent in a habeas proceeding is the person with day-to-day physical control over the detainee—*i.e.*, the immediate custodian. That settled rule is dictated by the terms of the habeas statutes. The habeas laws have long specified that the writ "shall be directed to

the person having custody of the person detained." 28 U.S.C. 2243 (emphasis added); see Act of Feb. 5, 1867, ch. 28, 14 Stat. 385, 386 ("writ shall be directed to *the person* in whose custody the party is detained") (emphasis added). The statutory focus on "the person" with direct control over the detainee is reinforced by the requirements that the petitioner "allege * * * the name of the person who has custody over him," 28 U.S.C. 2242, and that, in appropriate circumstances, "the person to whom the writ is directed shall * * * produce at the hearing the body of the person detained," 28 U.S.C. 2243.

The Supreme Court long ago made clear that, under those provisions, the proper respondent to a habeas petition is the detainee's immediate custodian. See *Wales* v. *Whitney*, 114 U.S. 564, 574 (1885). After reviewing and quoting the requirements that the writ be directed to "the person" with custody over the detainee and that the custodian be able to bring the body of the detainee before the court, the Court explained: "All these provisions contemplate a proceeding against some person who has the *immediate custody* of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary." *Ibid*. (emphasis added). "The immediate custodian rule" thereby "effectuates section 2243's plain meaning and gives a natural, commonsense construction to the statute." *Vasquez* v. *Reno*, 233 F.3d 688, 693 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001); see *Jones* v. *Biddle*, 131 F.2d 853, 854 (8th Cir. 1942) (citing *Wales* and explaining that proper habeas respondent has "actual physical custody" over prisoner).

Following *Wales*, a long line of decisions in the courts of appeals holds that the proper respondent in a habeas action is the detainee's immediate, not ultimate, custodian. In *Sanders* v. *Bennett*, 148 F.2d 19 (D.C. Cir. 1945), for instance, the D.C. Circuit rejected the suggestion that the Attorney General was a proper respondent in a habeas action filed by a federal prisoner. Although all federal prisoners are "committed to the custody of the Attorney General," the court reasoned, he "is a supervising official rather than a jailer." *Id.* at 20; see *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 494-495 (1973) (explaining that writ acts "upon the person who holds [the detainee] in what is alleged to be unlawful custody," *i.e.*, the "jailer") (internal quotation marks omitted). The court thus held that the proper respondent "is the warden of the penitentiary in which the prisoner is confined rather than an official in Washington, D.C., who supervises the warden." 148 F.2d at 20.*

This Court adopted that rule in *Billiteri* v. *United States Board of Parole*, 541 F.2d 938 (2d Cir. 1976). *Billiteri* concerned a habeas petition filed by a federal prisoner

---

* See also, *e.g.*, *Vasquez*, 233 F.3d at 693 ("case law establishes that the warden of the penitentiary not the Attorney General is the person who holds the prisoner in custody for habeas purposes"); *In re Hanserd*, 123 F.3d 922, 925 n.2 (6th Cir. 1997) (proper respondent is prison warden, not "executive with ultimate statutory authority"); *Yi* v. *Maugans*, 24 F.3d 500, 507 (3d Cir. 1994) (rejecting suggestion that Attorney General could be proper habeas custodian); *Jones*, 131 F.2d at 854 (same).

challenging the refusal of the Board of Parole to grant his release. Although confined in Pennsylvania, the prisoner filed his action in the Western District of New York, where he had been convicted. This Court dismissed the petition for lack of jurisdiction, explaining that "Billiteri's custodian throughout the district court litigation was the Warden at the Federal Penitentiary at Lewisburg, Pennsylvania, where Billiteri was incarcerated." *Id.* at 948. The Court rejected the suggestion that the proper custodian was the Board of Parole rather than the warden. As the Court explained, "it would stretch the meaning of the term beyond the limits thus far established by the Supreme Court to characterize the Parole Board as the 'custodian' of a prisoner who is under the control of a warden and confined in a prison, and who is seeking, in a habeas corpus action, to be released from precisely that form of confinement." *Ibid*. "At that point," the Court observed, "the prisoner's relationship with the Parole Board is based solely on the fact that it is the decision-making body which may, in its discretion, authorize a prisoner's release on parole." *Ibid*.

The rule that the proper respondent in a habeas action is the immediate custodian or "jailer" applies with full force in the context of persons detained by the military. In *Monk* v. *Secretary of the Navy*, 793 F.2d 364 (D.C. Cir. 1986), a military prisoner incarcerated at Fort Leavenworth, Kansas, brought a habeas petition in the District of Columbia, naming the Secretary of the Navy as the respondent. The D.C. Circuit held that the district court lacked jurisdiction over the petition. *Id.* at 369. The court explained that, "for purposes of the federal habeas corpus statute, jurisdiction is proper only in the district in which

the immediate, not the ultimate, custodian is located." *Ibid*. Because the petitioner was held at Fort Leavenworth, the court found, "his custodian is the commandant of that facility." *Ibid*. The court rejected the contention that the Secretary of the Navy could be considered the proper respondent, ruling that the "argument that the Secretary can be considered his custodian for purposes of habeas corpus is no different from the claim that the Attorney General is the custodian of all federal prisoners." *Ibid*.

2. The district court acknowledged that, "as a general rule," the proper respondent in a habeas action is "the warden of the facility where [the detainee] is held." 233 F. Supp. 2d at 579. But the court read various decisions—particularly *dicta* in this Court's opinions in *Billiteri* and *Henderson* v. *INS*, 157 F.3d 106 (2d Cir. 1998), cert. denied, 526 U.S. 1004 (1999)—to support "a more flexible approach" in "other than the usual cases," 233 F. Supp. 2d at 579, under which the identity of the proper respondent "may turn on the facts before the court," *id.* at 581. The court believed that the most salient fact in this case was the degree of "personal involvement of the Cabinet-level official named as a respondent," Secretary Rumsfeld. *Ibid*. Observing that Secretary Rumsfeld "was charged by the President in the June 9 Order with detaining Padilla," and that "it would appear to be Secretary Rumsfeld who decides when and whether all that can be learned from Padilla has been learned" and "the danger [Padilla] allegedly poses has passed," the court ruled that Secretary Rumsfeld is the proper respondent. *Id.* at 581-582. That conclusion is erroneous as a matter of law and fact.

a. First, contrary to the district court's suggestion (233 F. Supp. 2d at 579), this Court's decision in *Billiteri* does not sanction avoidance of the immediate custodian rule in this case. *Billiteri holds* that the prison warden rather than the Board of Parole is the proper respondent in a habeas action challenging a refusal to grant release on parole. 541 F.2d at 948. To be sure, *Billiteri* suggests in *dicta* that there may be "circumstances where a parole board *may* properly be considered a custodian for habeas corpus purposes, *e.g.*, after a prisoner has been released into its custody on parole * * * or *arguably*, when the Board itself has caused a parolee to be detained for violation of his parole." *Ibid*. (emphasis added) (citations omitted). But the *holding* of the decision is that, when a detainee is "under the control of a warden and confined in a prison" and seeks "to be released from precisely that form of confinement," the proper habeas respondent is the warden with day-to-day physical custody rather than a "decision-making body which may, in its discretion, authorize [the] prisoner's release." *Ibid*.

That holding controls this case. Padilla, like Billiteri, is held in a federal facility under the day-to-day control of the facility commander, and he seeks release from "precisely that form of confinement." *Ibid*. Consequently, the commanding officer of the facility is the proper respondent, rather than an ultimate custodian with "decision-making" authority to order Padilla's release. *Ibid*. Unlike the situation of a habeas petitioner who "has been released into [the parole board's] custody on parole" (*ibid*.) and therefore has no traditional immediate custodian, Padilla seeks to be released from present, physical confinement. In that circumstance, as *Billiteri* makes clear, the proper

respondent is the immediate custodian, *i.e.*, Commander Marr.

For the same reason, the district court erred in relying (233 F. Supp. 2d at 581) on decisions involving habeas petitions filed by inactive military reservists. An inactive reservist is not subject to day-to-day confinement and has no immediate custodian, but "is as mobile as any other member of our society and conceivably can be in 'custody' anyplace he happens to be at the time." *Eisel* v. *Secretary of the Army*, 477 F.2d 1251, 1261 (D.C. Cir. 1973). Accordingly, "[u]nlike an incarcerated prisoner, an inactive reservist is in 'custody' only in a highly metaphysical sense." *Id.* at 1262; see *Strait* v. *Laird*, 406 U.S. 341, 344 (1972). In a habeas action seeking release from present, physical confinement, by contrast, the proper respondent is the person with day-to-day physical control over the detainee.

b. This Court's opinion in *Henderson* v. *INS* likewise affords no authority for avoiding application of the immediate custodian rule. To begin with, although that opinion discusses whether, notwithstanding the immediate custodian rule, the Attorney General can be a proper respondent when an alien seeks habeas relief from a deportation order, the opinion specifically leaves the issue unresolved. 157 F.3d at 128.[*] Unlike in this case, more

---

[*] The First Circuit, in a decision issued after *Henderson*, held that the warden of the detention facility rather than the Attorney General is the proper respondent in such cases. *Vasquez*, 233 F.3d at 694. According to the court, "there is no principled distinction between an alien

over, the petitioners in *Henderson* did not seek release from present, physical confinement—a fact the Court recognized to be "potentially significant * * * under the *Billiteri* analysis." 157 F.3d at 127 n.23.* In fact, *Henderson* reaffirms that "*Billiteri* appears to bar the designation of a higher authority" when, as here, "a habeas petitioner is under the day-to-day control of another custodian (such as the prison warden)." *Id.* at 126-127. *Henderson* thus supports the conclusion that, under the rule of *Billiteri*, Commander Marr is the proper respondent in this case.

In addition, while dicta in *Henderson* suggests that "practical problems" may justify deviating from the immediate custodian rule in narrow contexts, *id.* at 124; cf. *id.* at 122 (observing that immediate custodian rule governs "great majority of habeas cases"), the practical issues raised in *Henderson* have no applicability here. *Henderson* observes that some district courts had ruled that the Attorney General is a proper respondent in alien habeas actions because of a concern that the concentration of aliens in a handful of facilities would clog the courts with territorial jurisdiction over the immediate custodian. See *id.* at 127. That concern does not justify bypassing the immediate custodian rule, see *Vasquez*, 233 F.3d at 694, but in any event, there is no comparable issue in this case

---

held in a detention facility awaiting possible deportation and a prisoner held in a correctional facility awaiting trial or serving a sentence." *Id.* at 693.

* Each of the two petitioners was on release when he filed a habeas action challenging a deportation order entered against him. See 157 F.3d at 111, 112.

with the availability of relief in the district court with territorial jurisdiction over Padilla's immediate custodian. Similarly, unlike unique circumstances involving a habeas petitioner held at an undisclosed location, see *id.* at 696; *Demjanjuk* v. *Meese*, 784 F.2d 1114, 1116 (D.C. Cir. 1986), or held overseas, see *Ex parte Hayes*, 414 U.S. 1327 (1973) (Douglas, J., in chambers), enforcement of the immediate custodian rule in this case would not leave the detainee without any forum for seeking relief. See *Samirah* v. *O'Connell*, No. 03-1786, 2003 WL 21507968, at *5 (7th Cir. July 2, 2003) (indicating that only exception to immediate custodian rule arises when prisoner is held abroad "and there is thus no domestic forum where the custodian is present").

c. The district court thus erred in assuming that it could look past the immediate custodian rule and could consider such factors as the perceived degree of Secretary Rumsfeld's "personal involvement" in Padilla's transfer to military control and the determination of when he may be released. 233 F. Supp. 2d at 581. Secretary Rumsfeld's role in overseeing Padilla's detention is akin to that of any ultimate custodian. For instance, the district court found significant (*ibid.*) that the President's order directs Secretary Rumsfeld to take custody of Padilla. But the "Attorney General is designated, pursuant to statute, as the custodian of *all* federal prisoners, yet no one seriously suggests that [he] is a proper respondent in prisoner habeas cases." *Henderson*, 157 F.3d at 126 (citation omitted). The district court also emphasized (233 F. Supp. 2d at 581) that Secretary Rumsfeld may have a substantial role in determining "when and whether" the circumstances warrant Padilla's release. But the Parole Board in *Billiteri* likewise

could "in its discretion, authorize a prisoner's release on parole," yet this Court ruled that the warden with day-to-day physical control was the proper respondent. 541 F.2d at 948.

That is because an ultimate custodian with "decision-making" authority (*ibid.*) is not the relevant custodian, regardless of his level of "personal involvement" in overseeing the detainee's custody. The proper respondent under the habeas statutes instead is the "person who has the immediate custody of the party detained" and who thus is best situated to "produce the body of such party before the court" if necessary. *Wales*, 114 U.S. at 574; see *Vasquez*, 233 F.3d at 691 ("The warden is the proper custodian because he has day-to-day control over the petitioner and is able to produce the latter before the habeas court."); *Guerra* v. *Meese*, 786 F.2d 414, 416 (D.C. Cir. 1986) (same); *Jones*, 131 F.2d at 854 (same). See also *Henderson*, 157 F.3d at 122 ("person with immediate control over the prisoner has the literal power to 'produce' the body and is generally located in the same place as the petitioner").

In this case, consequently, "the person having custody of the person detained" (28 U.S.C. 2243) is Padilla's immediate custodian, Commander Marr. Because it is undisputed that she lies outside the district court's jurisdictional reach—even if measured by the New York long-arm statute, see Part I.B, *infra*—the amended petition must be dismissed.

B. The District Court's Territorial Jurisdiction Does Not Reach Either Padilla's Immediate Custodian Or His Ultimate Custodian

1. The terms of the habeas statutes establish a territorial limitation on the reach of a district court's habeas jurisdiction, specifying that "[w]rits of habeas corpus may be granted by" the "district courts * * * *within their respective jurisdictions*." 28 U.S.C. 2241(a) (emphasis added). That explicit territorial limitation originated in Congress's 1867 revision of the habeas laws. See Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. Congress added the language confining the district courts' habeas authority to "their respective jurisdictions" in order to address concerns that, without that amendment, "a judge of a United States court in one part of the Union would be authorized to issue a writ of *habeas corpus* to bring before him a person confined in another and remote part of the Union." 75 Cong. Globe, 39th Cong., 2d Sess. 790 (1867) (Sen. Trumbull). "The debates in Congress indicate that it was thought inconvenient, potentially embarrassing, certainly expensive and on the whole quite unnecessary to provide every judge anywhere with authority to issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat." *Carbo* v. *United States*, 364 U.S. 611, 617 (1961).

The result of the limitation on district courts' habeas authority to "their respective jurisdictions" thus is that "habeas corpus jurisdiction does not extend to officials outside the court's territorial limits." *Malone* v. *Calderon*, 165 F.3d 1234, 1237 (9th Cir. 1999); see *Monk*, 793 F.2d

at 369 ("jurisdiction is proper only in the district in which the immediate * * * custodian is located"); *Wright* v. *United States Bd. of Parole*, 557 F.2d 74, 77 (6th Cir. 1977) ("The habeas corpus power of federal courts over prisoners in federal custody has been confined by Congress through 28 U.S.C. § 2241 to those district courts within whose territorial jurisdiction the custodian is located."). Accordingly, the Supreme Court held in *Schlanger* v. *Seamans*, 401 U.S. 487 (1971), that an Arizona district court lacked habeas jurisdiction because the petitioner's custodian was located in Georgia. As the Court explained, "the absence of [the] custodian is fatal to * * * jurisdiction." *Id.* at 491.

In this case, neither Commander Marr nor Secretary Rumsfeld is located within the district court's territorial bounds. Commander Marr is located within the District of South Carolina, and Secretary Rumsfeld is located within the Eastern District of Virginia. See *Monk*, 793 F.2d at 369 & n.1 (concluding that Secretary of Navy is not proper habeas respondent but observing that Secretary "is located at the Pentagon" for purposes of territorial jurisdiction). It follows that the district court would lack jurisdiction over the amended petition even assuming that the proper respondent were Secretary Rumsfeld.

2. In asserting jurisdiction over Secretary Rumsfeld, the district court ruled that a habeas court's jurisdiction runs beyond the district's territorial boundaries to reach any person subject to service under the forum state's long-arm statute. 233 F. Supp. 2d at 583-587. That conclusion lacks merit.

a. To begin with, if a habeas court's jurisdiction were defined by the reach of the state long-arm statute rather than the physical situs of the custodian, every district that could demonstrate the requisite contacts with the custodian would have jurisdiction over a particular habeas action. In this case, for instance, the district court's approach would entail concluding that any district in which Secretary Rumsfeld conducts business and is subject to process would have jurisdiction over the amended petition. That sort of overlapping and duplicative jurisdiction is incompatible with the statutory condition confining district courts to "their respective jurisdictions." 28 U.S.C. 2241(a). Congress added that language specifically to foreclose any possibility that a habeas court could issue process beyond its territorial boundaries. See 75 Cong. Globe, 39th Cong., 2d Sess. 790 (1867) (Sen. Trumbull) (observing that addition of phrase "within their respective jurisdiction" addresses "practical evil" that would result if a habeas court had "the right to issue process [that] extends all over the Union").

In fact, the habeas laws make clear that there is only *one* district court with territorial jurisdiction in any given case, *viz*., the district in which the custodian is located: The statutes provide that the "Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application * * * to *the* district court having jurisdiction to entertain it." 28 U.S.C. 2241(b) (emphasis added); see 28 U.S.C. 2242 ("If addressed to the Supreme Court, a justice thereof or a circuit judge [the petition] shall state the reason for not making application to *the* district court of the district in which the applicant is held.") (emphasis

added); compare, *e.g.*, 28 U.S.C. 1404(a) (permitting transfer based on venue considerations "to *any* other district or division where [the action] might have been brought") (emphasis added).* The Federal Rules reinforce the statutory direction that there is only one "district court having jurisdiction to entertain" a habeas action (28 U.S.C. 2241(b)), providing that "[a]n application for a writ of habeas corpus must be made to *the* appropriate district court." Fed. R. App. P. 22(a) (emphasis added). That understanding cannot be squared with the district court's ruling that habeas courts have overlapping jurisdiction under state long-arm statutes.

b. The district court's emphasis on the custodian's amenability to service of process rather than the custodian's physical location derived (233 F. Supp. 2d at 584) from this Court's opinions in *Henderson* and *United States ex rel. Sero* v. *Preiser*, 506 F.2d 1115 (2d Cir. 1974), cert. denied, 421 U.S. 921 (1975), both of which assume that

---

* When Congress intends to vest habeas jurisdiction in more than one district court, it does so explicitly. For instance, the habeas statutes provide that, when the petitioner is "in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed" not only "in the district court for the district wherein such person is in custody," but also "in the district court for the district within which the State court was held which convicted and sentenced him," and "each of such district courts shall have *concurrent jurisdiction* to entertain the application." 28 U.S.C. 2241(d) (emphasis added).

habeas jurisdiction coincides with the reach of process in a civil lawsuit. See *Henderson*, 157 F.3d at 122; *Preiser*, 506 F.2d at 1128.* Both opinions base that assumption on the Supreme Court's remark in *Braden* v. *30th Judicial Circuit Court* that, "[s]o long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction.'" 410 U.S. at 495 (quoting 28 U.S.C. 2241(a)). That statement must be considered in the context of the Court's conclusion in *Braden* that the district court had habeas jurisdiction because "the respondent was properly *served in that district*," *i.e.*, within the court's territorial borders. *Id.* at 500 (emphasis added). *Braden's* reference to reaching a custodian by service of process thus did not contemplate service outside the district court's territory. See *Guerra*, 786 F.2d at 417 ("The *Braden* decision in no way stands for the proposition * * * that federal courts may entertain a habeas corpus petition when the custodian is outside their territorial jurisdiction.").

The same conclusion follows from recognizing that *Braden* only partially overruled *Ahrens* v. *Clark*, 335 U.S. 188 (1948), which had held that *both* the detainee and the custodian must be within a habeas court's territorial jurisdiction, see *Schlanger*, 401 U.S. at 489-490 (describing holdings of *Ahrens*). While *Braden* held that the detainee need not be present in the district, 410 U.S. at

---

* As the district court recognized, "*Henderson* * * * assumed more than held that New York's long-arm statute can provide the basis for personal jurisdiction over habeas corpus respondents." 233 F. Supp. 2d at 585.

494-495, it left intact the requirement that the *custodian* be present in the district. See, *e.g.*, *Lee* v. *United States*, 501 F.2d 494, 501 (8th Cir. 1974) (*Braden* maintained "jurisdictional requisite of the presence of the custodian within the territorial confines of the district court"). *Braden* thereby embraced the position of the dissent in *Ahrens*, which thought it sufficient if the custodian were located within the district, and which construed the language "within their respective jurisdictions" in 28 U.S.C. 2241(a) as "confining the running of the court's process to its territorial jurisdiction." 335 U.S. at 206 (Rutledge, J., dissenting).*

---

* *Strait* v. *Laird*, 406 U.S. 341 (1972), is not to the contrary. *Strait* involved the anomalous situation of an unattached, inactive military reservist living in California, who was not subject to the day-to-day control of any custodian. Although the commander of the recordkeeping center in Indiana holding the reservist's records could nominally be considered the custodian, "[t]o give the commanding officer of the Center 'custody' of the thousands of reservists throughout the United States and to hold * * * that the commanding officer is present for habeas corpus purposes only within one small geographic area is to ignore reality." *Id.* at 345 (internal quotation marks omitted). Accordingly, the Court permitted the reservist to sue in California based on the presence there of individuals in the chain of command who processed his discharge application. *Ibid*. *Strait's* "fact-specific holding" is "not intended to be a rule of general application," *Vasquez*, 233 F.3d at 695 n.6, and does not suggest that a habeas court may reach beyond its territorial borders in a

Moreover, the conclusion that habeas jurisdiction turns on the reach of a state long-arm statute assumes that a district court's habeas jurisdiction matches its general civil jurisdiction under the Federal Rules. See Fed. R. Civ. P. 4(e)(1), 4(k)(1)(A). That assumption cannot be squared with the Supreme Court's holding that 28 U.S.C. 1391(e), which provides for nationwide service of process on federal officers, fails to relax the rule that habeas "jurisdiction over the respondent [is] territorial." *Schlanger*, 401 U.S. at 490 & n.4; see *Dunne* v. *Henman*, 875 F.2d 244, 248 (9th Cir. 1989). If a federal *statute* authorizing service of federal officers nationwide fails to expand the territorial constraints on habeas jurisdiction, those constraints necessarily remain unaffected by a federal *rule* authorizing service of process under a state long-arm statute. See *Harris* v. *Nelson*, 394 U.S. 286, 295 (1969) (draftsmen of civil rules understood that "rules would have very limited application to habeas corpus proceedings"); Fed. R. Civ. P. 82 (rules do not "extend or limit the jurisdiction of the United States district courts"). The district court therefore lacks territorial jurisdiction over Commander Marr and Secretary Rumsfeld, affording an independent basis for dismissal of the amended petition.

---

traditional habeas action seeking relief from present physical confinement.

POINT II

Attorney Newman Lacks Standing As A "Next Friend" To Bring The Amended Petition On Padilla's Behalf

The habeas statutes require that a petition be "signed and verified by the person for whose relief it is intended *or by someone acting in his behalf*." 28 U.S.C. 2242 (emphasis added). The allowance for an action by a third party is designed to address situations in which the detainee—"usually because of mental incompetence or inaccessibility"—is unable himself to seek relief. *Whitmore* v. *Arkansas*, 495 U.S. 149, 162-163 (1990). But a third party filing on behalf of the detainee must overcome the strict jurisdictional requirement to establish standing as a "next friend." See *id.* at 163-165; *Coalition of Clergy, Lawyers, & Professors* v. *Bush*, 310 F.3d 1153 (9th Cir. 2002), cert. denied, 123 S. Ct. 2073 (2003); *Hamdi* v. *Rumsfeld*, 294 F.3d 598 (4th Cir. 2002) (*Hamdi I*). The "availability of next friend standing as an avenue into federal court is strictly limited," *Hamdi I*, 294 F.3d at 603, and the "burden is on the 'next friend' clearly to establish the propriety of his status and thereby justify the jurisdiction of the court," *Whitmore*, 495 U.S. at 164. In this case, attorney Newman cannot carry that burden.[*]

---

[*] Although the district court did not include the question of next-friend standing among the issues it viewed as justifying an interlocutory appeal of its orders, this Court must be assured of the existence of standing before addressing the merits of the appeal. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998).

To establish standing, a next friend must explain "why the real party in interest cannot appear on his own behalf." *Whitmore*, 495 U.S. at 163. In addition, and of central relevance here, "a 'next friend' must have some significant relationship with the real party in interest." *Id.* at 164; see *Coalition of Clergy*, 310 F.3d at 1161-1162; *Hamdi I*, 294 F.3d at 604. The "requirement of a significant relationship is * * * connected to a value of great constitutional moment," because it prevents a "litigant asserting only a generalized interest in constitutional governance [from] circumvent[ing] the jurisdictional limits of Art. III simply by assuming the mantle of 'next friend.'" *Id.* at 605 (quoting *Whitmore*, 495 U.S. at 164). The existence of a significant relationship helps ensure that the next friend has a personal stake in the controversy and is fully dedicated to serving the detainee's interests. See *Coalition of Clergy*, 310 F.3d at 1161-1162; *Hamdi I*, 294 F.3d at 604-606. The requirement is "not merely 'technical,'" *id.* at 607, as concessions made by a next friend are binding on the detainee.

In any event, as the district recognized (256 F. Supp. 2d at 223 n.3), a court of appeals "may address any issue fairly included within" an order certified for interlocutory appeal, because "it is the *order* that is appealable, and not the controlling question identified by the district court." *Yamaha Motor Corp.* v. *Calhoun*, 516 U.S. 199, 205 (1996) (emphasis in original) (internal quotation marks omitted). The orders certified for appeal in this case directly addressed the issue of next-friend standing. See 233 F. Supp. 2d at 575-578.

Accordingly, next-friend standing normally is reserved for those with a close, personal relationship with the detainee, typically an immediate family member. See, *e.g.*, *Vargas* v. *Lambert*, 159 F.3d 1161, 1168 (9th Cir.) (parent), stay vacated, 525 U.S. 925 (1998); *In re Heidnik*, 112 F.3d 105, 106 n.1 (3d Cir. 1997) (daughter); *Smith* v. *Armontrout*, 812 F.2d 1050, 1052 (8th Cir.) (brother), cert. denied, 483 U.S. 1033 (1987). In this case, by contrast, attorney Newman had no previous relationship with Padilla when appointed as his counsel in connection with his arrest as a material witness. Moreover, that association ended after 25 days upon Padilla's transfer to military control. The district court nonetheless ruled that Ms. Newman had forged the requisite "significant relationship" with Padilla while representing him in the material witness proceedings. See 233 F. Supp. 2d at 576.

Although attorneys on occasion have been accorded next-friend standing (see *id.* at 578), those attorneys have had longstanding relationships with the prisoner. See *Miller* v. *Stewart*, 231 F.3d 1248, 1251 (9th Cir.), stay vacated, 531 U.S. 986 (2000)[*]; *Ford* v. *Haley*, 195 F.3d 603, 624 (11th Cir. 1999) (noting that "[i]n certain circumstances, attorneys * * * who have a long history of representing a client with mental disorders may appear as 'next friend'"); *Schornhorst* v. *Anderson*, 77 F. Supp. 2d 944, 951 (S.D. Ind. 1999) (representation for between five and

---

[*] The attorney in *Miller* had been associated with the prisoner for more than a four-year period. See *State* v. *Miller*, 921 P.2d 1151, 1154 (Ariz. 1996) (listing counsel), cert. denied, 519 U.S. 1152 (1997).

ten years); *In re Cockrum*, 867 F. Supp. 494, 495 (E.D. Tex. 1994) (one year). Conversely, the mere existence of an attorney-client association, without regard to the duration or character of the relationship, does not itself constitute a "significant relationship" for purposes of next-friend standing. See *Hamdi I*, 294 F.3d at 598 (denying standing to public defender based on absence of pre-existing relationship). The district court identified no decision according next-friend standing to an attorney based on an association comparably brief in duration to the one in this case. And even if attorney Newman's past representation of Padilla leaves her "best suited to try to achieve" his objectives (233 F. Supp. 2d at 576), the question here does not concern her qualifications to act as legal counsel in a next-friend action. The question instead is whether she possesses the requisite significant relationship to act herself as the next friend.

Nor does this case involve the exceptional circumstance of a detainee with no apparent significant relationships. See *Hamdi I*, 294 F.3d at 606. The amended petition states that attorney Newman continues to consult with members of Padilla's family, who presumably could file a next-friend action on his behalf. JA 30 (¶ 20). Strict adherence to the significant relationship requirement is especially warranted in that situation. See *Hamdi I*, 294 F.3d at 606 (denying next-friend standing to public defender and noting "stark contrast" between the public defender and a "close familial connection that was right around the corner"). Indeed, as the Fourth Circuit explained in *Hamdi I*, strict enforcement of the conditions for next-friend standing in the present context reinforces

the "limits to which the conduct of war may be reduced to the medium of litigation." *Ibid*.

POINT III

The District Court Erred In Ordering The Military To Permit A Detained Enemy Combatant To Meet And Confer With Counsel

The capture and detention of enemy combatants reflects settled historical practice in wartime, and the United States military has detained enemy combatants in virtually every significant conflict in the Nation's history, including the current conflict. That established historical practice is sanctioned by the laws of war, is a core exercise of the President's Commander-in-Chief authority, and is consistent with federal law. The district court ruled that the circumstances of Padilla's detention, as elaborated in the President's Order and the Mobbs Declaration, fit squarely within the military's wartime authority to detain enemy combatants. 233 F. Supp. 2d at 588-598. The court held that the "President * * * has both constitutional and statutory authority to exercise the powers of Commander in Chief" in the current conflict, "including the power to detain unlawful combatants, and it matters not that Padilla is a United States citizen captured on United States soil." *Id.* at 606.

After upholding the President's *legal* authority to detain Padilla as an enemy combatant, the district court turned to the *factual* basis for the President's determination that Padilla is an enemy combatant. The court explained that the political branches "need not submit" their "judgments on the exercise of war powers * * * to review

by Article III courts," and that the "commission of a judge" thus "does not run to deciding *de novo* whether Padilla is associated with al Qaeda." *Id.* at 607-608. Consequently, the court held that it would "examine only whether the President had some evidence to support his finding that Padilla was an enemy combatant, and whether that evidence has been mooted by events subsequent to his detention." *Id.* at 610. The court nonetheless ruled that Padilla is entitled to present facts disputing the President's determination, and that Padilla therefore must be afforded access to counsel to enable his presenting a factual challenge. *Id.* at 599-605. That ruling was error.

A. Padilla Has No Entitlement Under Law To Meet With Counsel To Challenge The Determination That He Is An Enemy Combatant

1. Neither The Laws Of War Nor The Constitution Grants An Enemy Combatant A Right To Counsel To Contest His Wartime Detention

a. There is no basis in historical tradition or practice for recognizing a right of enemy combatants to have counsel for the purpose of challenging their wartime detention. Requiring the military to permit every enemy combatant captured in a conflict to challenge the basis for his detention would be inherently incompatible with the military's conduct of the war. Accordingly, the laws and customs of war recognize no general right for enemy combatants to access counsel to contest their wartime detention.

For instance, under the Third Geneva Convention, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135 (GPW), prisoners of war have no entitlement to counsel to challenge their detention. The President has determined that al Qaida and its associates are unlawful combatants, and they thus do not come within the provisions of the GPW in any event. See White House Fact Sheet, Status of Detainees at Guantanamo, Office of the Press Secretary, Feb. 7, 2002 <www.whitehouse.gov/news/releases/2002/02/20020207-13.html>. But even as to lawful combatants, Article 105 of the GPW provides only for a prisoner of war to be afforded counsel in the event that formal charges are initiated against him in a trial proceeding, underscoring that prisoners of war subject only to detention as such and not charged with specific war crimes have no right to counsel to challenge their wartime detention.

Nor is there any obligation under the laws and customs of war to bring charges against an enemy combatant—to the contrary, the vast majority of combatants seized in a war are never charged with an offense but are simply detained during the conflict to prevent them from rejoining the enemy. See *Hamdi* v. *Rumsfeld*, 316 F.3d 450, 465 (4th Cir. 2003) (*Hamdi III*) ("[T]he precautionary measure of disarming hostile forces for the duration of a conflict is routinely accomplished through detention rather than the initiation of criminal charges. To require otherwise would impose a singular burden upon our nation's conduct of the war."). Consequently, the settled authority under the laws of war to detain enemy combatants in the course of a conflict *is* an authority to detain without affording access to counsel to challenge the basis for the detention.

b. The Constitution likewise affords no right to counsel in this case. That is because Padilla is being detained solely as an enemy combatant, not for any criminal or other punitive purpose. His detention, like that of all enemy combatants in wartime, serves two purposes directly related to the conduct of the war. First, "detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies." *Hamdi III*, 316 F.3d at 465; see *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946). Second, detention enables the military to gather vital intelligence from enemy combatants in advancement of the prosecution of the war. Accordingly, Padilla's detention "'is neither a punishment nor an act of vengeance,' but rather a 'simple war measure.'" *Hamdi III*, 316 F.3d at 465 (quoting W. Winthrop, *Military Law and Precedents* 788 (2d ed. 1920)).

As the district court correctly found (233 F. Supp. 2d at 600-601), neither the Sixth Amendment nor the Fifth Amendment's Self-Incrimination Clause affords a right to counsel for enemy combatants. The Sixth Amendment applies by its terms only in the case of "criminal prosecutions," U.S. Const. amend. VI, and does not attach until initiation of formal criminal proceedings. See, *e.g.*, *Texas* v. *Cobb*, 532 U.S. 162, 167-168 (2001); cf. *Middendorf* v. *Henry*, 425 U.S. 25, 38 (1976) ("[A] proceeding which may result in deprivation of liberty is nonetheless not a 'criminal proceeding' within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a traditional civilian criminal trial."). Similarly, the right to counsel associated with the Self-Incrimination Clause (see *Miranda* v. *Arizona*, 384 U.S. 436 (1966)) is a "trial right of criminal defendants"

pertaining to police custody in criminal investigations. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); see *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003).

The Due Process Clause of the Fifth Amendment likewise affords no right to counsel for enemy combatants to challenge their detention. Recognizing a generalized due process right to counsel for enemy combatants could not be squared with settled historical practice, under which no comparable right has been found under domestic law or the laws of war. See *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942) ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."); cf. *Herrera* v. *Collins*, 506 U.S. 390, 407-408 (1993) (examining "[h]istorical practice" in assessing scope of "Fourteenth Amendment's guarantee of due process"). Moreover, recognition of any such right is unnecessary under the appropriate standard of review of the President's wartime judgments, and would compromise a central purpose of detention—gathering intelligence from detainees. See Parts III.B-C, *infra*. Accordingly, there is no basis for creating a due process right to counsel that lacks any grounding in tradition or precedent.

2. The Habeas Statutes Do Not Afford Padilla A Free-Standing Entitlement To Raise A Factual Challenge To His Detention

The district court's conclusion that Padilla is entitled to meet with counsel was grounded in a mistaken belief that

the habeas statutes afford him an absolute right to present facts in support of the petition. The court located that entitlement principally in 28 U.S.C. 2243, which provides for the applicant to allege and deny facts, and 28 U.S.C. 2246, which allows for the taking of evidence. 233 F. Supp. 2d at 599-600. Reading those provisions to confer a "statutorily granted right to present facts," the court reasoned that vindication of that right required affording Padilla access to counsel. *Id.* at 604. Accordingly, the court ordered access to counsel under the All Writs Act, 28 U.S.C. 1651, which permits issuance of "writs necessary or appropriate in aid of * * * jurisdiction[] and agreeable to the usages and principles of law."*

Contrary to the district court's assumption, the habeas provisions identified by the court do not confer an absolute entitlement to present facts. Instead, those provisions allow for presenting facts or taking evidence only when necessary to enable resolving the legality of the challenged detention. See, *e.g.*, *Walker* v. *Johnston*, 312 U.S. 275, 284

---

* Although review of an exercise of All Writs Act authority is for abuse of discretion, see, *e.g.*, *United States* v. *International Bhd. of Teamsters*, 266 F.3d 45, 49 (2d Cir. 2001), the question here is the antecedent one of whether there is any legal basis for affording Padilla a right to access counsel to challenge his detention as an enemy combatant. That question is one of law and is subject to plenary review. If Padilla has no entitlement under law to meet with counsel, it follows that the access order is not "necessary or appropriate * * * and agreeable to the usages and principles of law." 28 U.S.C. 1651.

(1941) (noting that "the court may find that no issue of fact is involved" after examining the petition and return, and may conclude "from undisputed facts or from incontrovertible facts" that, "as a matter of law, no cause for granting the writ exists"). The district court itself recognized that the habeas laws afford a vehicle only for legal challenges and for ensuring that the President had some evidentiary basis for his determination, not for *de novo* review of the underlying facts. See 233 F. Supp. 2d at 608. Accordingly, the habeas provisions allowing for presentation of facts in appropriate situations supply no independent basis for the district court's ruling that Padilla has an absolute entitlement to present facts and an attendant right of access to counsel.*

The Fourth Circuit's decision in *Hamdi* is instructive. The petitioner in that case argued on the basis of the same habeas statutes invoked here by the district court that he was entitled to test the factual basis for the military's determination that he is an enemy combatant. The Fourth Circuit disagreed, explaining:

---

* Those provisions, in any event, would have to be applied in a manner that takes account of the significant separation-of-powers concerns raised by judicial inquiry into the factual basis for the President's wartime judgments. See Part III.B, *infra*; cf. *Burns* v. *Wilson*, 346 U.S. 137, 139-140 (1953) (plurality opinion) ("[T]he law which governs a civil court in the exercise of its jurisdiction over military habeas corpus applications cannot simply be assimilated to the law which governs the exercise of that power in other instances.").

> While the ordinary § 2241 proceeding naturally contemplates the prospect of factual development, *see* 28 U.S.C. §§ 2243, 2246, such an observation only *begs the basic question* in this case—whether further factual exploration would bring an Article III court into conflict with the warmaking powers of Article I and II. Here, the specific interests asserted by the government flow directly from the warmaking powers and are intimately connected to them.

Hamdi III, 316 F.3d at 470 (emphasis added). The court went on to rule that the government's "warmaking powers" entitled it to detain the petitioner without any need to permit him "to rebut the factual assertions that were submitted [by the government] to support the 'enemy combatant' designation." *Id.* at 473.

To be sure, *Hamdi* arose in a factual context distinct in certain respects from this case. See *id.* at 465. But any difference in the locus of capture has no effect on *Hamdi's* conclusion that reliance on the habeas provisions allowing for presentation of facts only "begs the basic question in this case"—whether the military is required to allow an individual detained as an enemy combatant to meet with counsel for the purpose of conducting a "further factual exploration" of the basis for his detention. *Id.* at 470. Because an enemy combatant has no entitlement to present facts to challenge the basis for his detention nor any

entitlement to counsel for that purpose, the district court's access order is erroneous as a matter of law.*

B. There Is No Basis For Granting Access To Counsel Under The Constitutionally Appropriate Standard Of Review

As this Court has explained, "constitutionally-mandated deference to military assessments and judgments gives the judiciary far less scope to scrutinize the reasons, legitimate on their face, that the military has advanced to justify its actions." *Able* v. *United States*, 155 F.3d 628,

---

* The order is also anomalous when juxtaposed against the court's ruling that Padilla's counsel has next-friend standing. Although the habeas statutes may permit—but do not require—appointment of counsel in some circumstances, in a next-friend proceeding, counsel directly represents the next friend, not the detainee. See *In re Heidnik*, 112 F.3d at 112. So, for example, if a next-friend petition were filed by Padilla's mother, attorney Newman would be appointed to represent (and would have access to) Padilla's mother. Here, because Newman purports to serve as Padilla's next friend, she could only be appointed to represent herself. That anomaly underscores that counsel in this case lacks next-friend standing. But the appointment of counsel for the next friend does not involve access to the detainee. In fact, a next-friend action presupposes the detainee's inaccessibility. *Whitmore*, 495 U.S. at 163. The district court's order that counsel be permitted to meet with the detainee thus has the effect of eliminating the inaccessibility that is a condition for the action in the first place.

634 (2d Cir. 1998). The proper standard of judicial review of the President's determination that Padilla is an enemy combatant entails, at most, confirming the existence of "some evidence" supporting the President's judgment. Because that standard turns exclusively on the facts presented by the Executive, there is no basis or necessity for requiring that Padilla be afforded access to counsel. Cf. 28 U.S.C. 1651 (allowing issuance of writs if "necessary or appropriate * * * and agreeable to the usages and principles of law").

1. Because "capturing and detaining enemy combatants is an inherent part of warfare," *Hamdi III*, 316 F.3d at 467, the determination that Padilla is an enemy combatant "bears the closest imaginable connection to the President's constitutional responsibilities during the actual conduct of hostilities," *id.* at 466. That determination turns on considerations uniquely within the authority and expertise of the Commander in Chief. See *Hirota* v. *MacArthur*, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say."). As the Fourth Circuit recognized in *Hamdi*, the "President is best prepared to exercise the military judgment attending the capture of alleged combatants." *Hamdi III*, 316 F.3d at 472 (internal quotation marks omitted).

The deference normally owed military judgments therefore is at its broadest with respect to the President's determination that an individual is as an enemy combatant.

In fact, "the Supreme Court [has] stated in no uncertain terms that detentions 'ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger' should not 'be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.'" *Ibid.* (quoting *Quirin*, 317 U.S. at 25); see *Center for Nat'l Sec'y* v. *U.S. Dep't of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003) (observing that "several federal courts * * * have wisely respected the executive's judgment in prosecuting the national response to terrorism" and that it "is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role" in "acquir[ing] and exercis[ing] the expertise of protecting national security"). "[T]here is all the more reason for deference" where, "as here," the "President * * * act[s] with statutory authorization from Congress." *Hamdi* v. *Rumsfeld*, 296 F.3d 278, 281 (4th Cir. 2002) (*Hamdi II*).

2. The district court ordered that Padilla be afforded access to counsel to allow him "the opportunity to present evidence that undermines the reliability of the Mobbs Declaration." 243 F. Supp. 2d at 56. That manner of proceeding would risk entangling the judiciary in highly sensitive judgments lying at the heart of the Commander-in-Chief power. See *Hamdi II*, 296 F.3d at 284 (observing that "development of facts may pose special hazards of judicial involvement in military decision-making"); see also *Hamdi III*, 316 F.3d at 470 (explaining that "risk created by" order to produce detailed factual information supporting enemy combatant determination "is that judicial involvement would proceed, increment by

increment, into an area where the political branches have been assigned by law a preeminent role").

In particular, if Padilla presented evidence designed to "undermine[] the reliability of the Mobbs Declaration" (243 F. Supp. 2d at 56), the court would be left to weigh that evidence against the Mobbs Declaration and assess the relative reliability of each. That would require the court to attempt to ascertain the nature of Padilla's activities and associations while in Afghanistan and Pakistan, the fair inferences to be drawn therefrom, and the reliability of foreign intelligence sources and information. Those sorts of "fine judgments" in evaluating "whether a particular activity is linked to the war efforts of a hostile power" are "judgments the executive branch is most competent to make." *Hamdi III*, 316 F.3d at 474. Any "effort to ascertain the facts concerning [Padilla's] conduct while amongst the nation's enemies would entail an unacceptable risk of obstructing war efforts authorized by Congress and undertaken by the executive branch." *Id.* at 474-475.

3. In view of the great deference owed the President's determination that Padilla is an enemy combatant and the serious separation-of-powers concerns that would attend any searching inquiry into the factual underpinnings of the President's judgment, a factual review of the President's determination can extend no further than ensuring that it has some evidentiary support. That framework focuses exclusively on the factual support presented by the *Executive*, and entails confirming the existence of "some evidence" supporting *its* determination that Padilla is an enemy combatant. Cf. *Superintendent* v. *Hill*, 472 U.S.

445, 455-457 (1985) (explaining that "some evidence" standard "does not require" a "weighing of the evidence," but calls for assessing "whether there is any evidence in the record that could support the conclusion" so as to ensure that the "record is not so devoid of evidence that the findings" are "without support or otherwise arbitrary"). Because any facts that Padilla would present do not bear on the dispositive question under that standard, there is no warrant for requiring that he be afforded access to counsel.

The district court incorporated into its "some evidence" standard an opportunity for Padilla to present facts, reasoning that, in other contexts, that standard applies only when a court reviews the outcome of a proceeding at which both sides presented evidence. See 243 F. Supp. 2d at 54-56. But whereas the some evidence standard may be justified in other contexts based on the presence of administrative findings in a formal adversary proceeding, the standard is warranted in the context of this case based on the need to avoid unduly entangling the courts in matters constitutionally committed to the Commander in Chief. See *Hamdi II*, 296 F.3d at 283 ("Separation of powers principles must * * * shape the standard for reviewing the government's designation of Hamdi as an enemy combatant."). The some evidence standard suitably addresses that concern by looking solely to the evidence before the Executive at the time of the challenged determination. See *Moyer* v. *Peabody*, 212 U.S. 78, 85 (1909) (rejecting challenge to executive detention during local insurrection on basis that, "[s]o long as such arrests are made in good faith and the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action

* * * on the ground that he had not reasonable ground for his belief"); see also *United States* v. *Salerno*, 481 U.S. 739, 748 (1987) ("[I]n times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom *the Government believes* to be dangerous") (emphasis added).

Contrary to the district court's suggestion (243 F. Supp. 2d at 56), the some evidence framework assures that the Executive may not detain persons arbitrarily, notwithstanding that it does not allow for Padilla to present evidence or meet with counsel. The object of confirming the presence of some evidence supporting the President's determination that Padilla is an enemy combatant is to ensure the existence of a valid basis for the President's conclusion. The Mobbs Declaration relates the ample factual basis for the President's determination, ruling out any conceivable suggestion that the determination was arbitrary. See Part III.D, *infra*.

For those reasons, granting Padilla access to counsel is not necessary to resolve the petition. A habeas action affords a vehicle for challenging the legal basis for Padilla's detention, but not to raise factual challenges when the President's determination is supported by some evidence.

C. Requiring Access To Counsel Would Compromise The Military's Efforts To Obtain Vital Intelligence

Ordering the military to afford Padilla access to counsel risks undermining the military's efforts to obtain critical intelligence in support of the war effort. See *United States* v. *Marchetti*, 466 F.2d 1309, 1315 (4th Cir.) ("[g]athering intelligence information" is "within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief"), cert. denied, 409 U.S. 1063 (1972); see also *Snepp* v. *United States*, 444 U.S. 507, 512 n.7 (1980) (per curiam) ("It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence.").

As is explained in the Jacoby Declaration, JA 55-63, a basic purpose served by detention of enemy combatants is to obtain intelligence concerning the enemy through interrogation of detainees. The need for securing intelligence is especially acute in the current conflict given the nature of the enemy and its tactics.. JA 59-60. Interrogation of detained enemy combatants has produced vital information in the current conflict, and has helped to thwart numerous potential attacks against the United States and interests in the aftermath of September 11, 2001. JA 60. Indeed, Padilla's capture resulted in substantial part from information obtained through such interrogations. JA 60.

In ordering Padilla's detention as an enemy combatant, the President determined that Padilla "possesses intelligence, including intelligence about personnel and

activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens." President's Order (June 9, 2002), JA 51. The Jacoby Declaration reinforces the President's judgment, assessing Padilla's intelligence value as potentially "very high," JA 51, and explaining that he is a possible source of information about, *inter alia*, al Qaida plans and initiatives, al Qaida associates in the United States or elsewhere, and al Qaida operations and capabilities, JA 61-62.

The military's interrogation efforts rely in large part on developing and maintaining an atmosphere of trust and dependency. JA 58-59. Achieving that objective can take a significant amount of time: In numerous instances, interrogators have obtained valuable intelligence from a subject after months, or even years, of failed efforts. JA 58. Because of the delicate nature of the relationship and the significant amount of time frequently required to achieve the necessary dependence and trust, interposing counsel into the relationship—even if only for a limited duration—risks irreparably damaging efforts to obtain intelligence. JA 59. A subject's expectation that counsel is assisting him would directly thwart the military's efforts to develop his trust in his interrogators and his perceived dependence on them. JA 62-63.

The risk of undermining intelligence gathering efforts is particularly pronounced in Padilla's case. His experience in the criminal justice system and his previous representation by counsel in the material witness proceeding renders him more likely than other detainees to

decline to provide intelligence and expect counsel's assistance. JA 62. If he comes to understand that counsel continues to act on his behalf, especially after months of military detention, granting access to counsel could set back his interrogations substantially if not derail the process entirely.

Vice Admiral Jacoby therefore concludes that "any potential sign of counsel involvement would disrupt our ability to gather intelligence from Padilla," and "would break—probably irreparably—the sense of dependency and trust that interrogators are attempting to create." JA 62. At a minimum, interposing counsel could result in critical delays in obtaining intelligence from Padilla. JA 62. Moreover, enabling counsel to learn about interactions between Padilla and his interrogators would unnecessarily risk disclosure of intelligence sources and methods, JA 63, and counsel could unwittingly become the conduit for passing of information from Padilla, JA 60.

The district court discounted the weight to be accorded Vice Admiral Jacoby's assessment of the consequences of affording access to counsel, concluding that while that assessment is "plausible, it is only plausible," and that "[t]here are other equally plausible scenarios." 243 F. Supp. 2d at 53. Vice Admiral Jacoby's assessment, however, is entitled to substantial deference in this proceeding. See *CIA* v. *Sims*, 471 U.S. 159, 176 (1985) ("judges * * * have little or no background in the delicate business of intelligence gathering"); *Hamdi III*, 316 F.3d at 473 ("To transfer the instinctive skepticism, so laudable in the defense of criminal charges, to the review of executive branch decisions premised on military

determinations made in the field carries the inordinate risk of a constitutionally problematic intrusion into the most basic responsibilities of a coordinate branch."). When considered alongside the absence of any right of access to counsel under the laws of war or the Constitution and the absence of any need for access under the appropriate standard of review, the implications of granting access to counsel for the military's efforts to gather vital intelligence from Padilla underscore that the district court's access order must be reversed.

D. The President's Determination That Padilla Is An Enemy Combatant Is Entitled To Be Given Effect In This Proceeding

Because the district court ruled that Padilla was entitled to meet with counsel for the purpose of subjecting the Mobbs Declaration to an adversary testing, the court declined to hold that the Declaration establishes the existence of "some evidence" for the President's determination that Padilla is an enemy combatant. This Court should so hold.*

---

* The district court also intended to assess whether the Mobbs Declaration has been "mooted by events subsequent to [Padilla's] detention." 233 F. Supp. 2d at 610. But if some evidence supports the President's determination that Padilla is an enemy combatant, there is no prospect of that determination becoming moot as a consequence of subsequent events. Any question of mootness could arise, at most, only on termination of the current conflict. As the district court explained, however, there is

The Mobbs Declaration reviews the information supplied to the President in connection with his determination that Padilla is an enemy combatant, and explains that the information is derived from multiple intelligence sources, including several confidential sources both in the United States and abroad with direct connections to al Qaida and knowledge of the relevant events. JA 45 (¶ 3). The information from those sources was corroborated by other intelligence information when available. JA 45 (¶ 3 & n.1).

As the Mobbs Declaration relates, the President was provided information that, *inter alia*, Padilla moved to Egypt in 1998 and traveled to Afghanistan and Pakistan in 2001 and 2002. JA 45-46 (¶¶ 4, 6, 8). During that time, Padilla was closely associated with al Qaida members and leaders. JA 46 (¶ 5). In Afghanistan in 2001, Padilla had discussions with senior Usama Bin Laden lieutenant Abu Zubaydah about conducting terrorist operations in the United States, including a plan to detonate a dirty bomb. JA 46 (¶¶ 6, 8). At Zubaydah's direction, Padilla traveled to Pakistan to receive training on the wiring of explosives, and he researched explosive devices at an al Qaida safe-house in Lahore, Pakistan. JA 46 (¶¶ 6-7). In Pakistan in

---

"no basis for contradicting the President's repeated assertions that the conflict has not ended." *Id.* at 590. See also *Ludecke* v. *Watkins*, 335 U.S. 160, 169-170 (1948) (explaining that termination of "state of war" is a "political act" and a "matter[] of political judgment for which judges have neither technical competence nor official responsibility").

2002, Padilla met on several occasions with senior al Qaida operatives to discuss plans for terrorist operations in the United States, including the dirty bomb plan and other operations involving detonation of explosives in hotel rooms and gas stations. JA 47 (¶ 9). At the direction of al Qaida members, Padilla returned to the United States to advance the conduct of terrorist operations on al Qaida's behalf. JA 47 (¶¶ 9-10).

The Mobbs Declaration confirms that there was an ample factual basis for the President's determination that Padilla is an enemy combatant, and it readily satisfies the "some evidence" standard. The President's determination thus is entitled to be given effect in this proceeding. Consequently, insofar as petitioner's legal challenges to Padilla's detention fail—as the district court correctly ruled—the amended petition is ripe for dismissal on the merits.

CONCLUSION

This Court should vacate the district court's orders and remand the case with instructions to dismiss the amended petition for lack of jurisdiction. In the alternative, this Court should vacate that portion of the district court's orders requiring that Padilla be afforded access to counsel and remand the case with instructions to dismiss the amended petition on the merits.

Dated: New York, New York
July 22, 2003

Respectfully submitted,

JAMES B. COMEY,
United States Attorney for the Southern District of New York

PAUL D. CLEMENT,
Deputy Solicitor General

DAVID B. SALMONS,
SRI SRINIVASAN,
Assistants to the Solicitor General

ERIC B. BRUCE,
CHRISTINE H. CHUNG,
Assistant United States Attorneys

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word-processing system used to prepare this brief, there are 13,855 words in this brief.

JAMES B. COMEY,
United States Attorney for the
Southern District of New York

By: CHRISTINE H. CHUNG,
Assistant United States Attorney